

**United States Department of Labor
Employees' Compensation Appeals Board**

J.K., Appellant

and

**DEPARTMENT OF THE NAVY, MID
ATLANTIC REGIONAL MAINTENANCE
FACILITY, Portsmouth, VA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 20-0591
Issued: August 12, 2020**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 22, 2020 appellant filed a timely appeal from a July 30, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed since OWCP's last merit decision, dated June 5, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

¹ Appellant also filed a timely request for oral argument. In a separate order dated August 7, 2020, the Board denied his request for oral argument as oral argument would further delay issuance of a Board decision and not serve a useful purpose. *Order Denying Request for Oral Argument*, Docket No. 20-0591 (issued August 7, 2020).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence following OWCP's July 30, 2019 decision. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 1, 2015 appellant, then a 54-year-old shipbuilding specialist, filed a traumatic injury claim (Form CA-1) alleging that on August 24, 2015 he sustained a neck injury when his hard hat struck an upper hatch opening when he ducked to walk into an air conditioning equipment room, causing him to fall to his knees while in the performance of duty.

OWCP initially received reports from a nurse, and progress reports from Dr. Shirley S. Chai, Board-certified in family practice.

By decision dated December 9, 2015, OWCP accepted the claim for post-concussion syndrome and cervical spine ligament sprain.

OWCP subsequently received an October 2, 2015 medical report, wherein Dr. Cathy X. Cao, a Board-certified neurologist, discussed appellant's August 24, 2015 incident. She reviewed prior diagnostic studies and noted his extensive cervical and lumbar history prior to the August 24, 2015 injury, which included major fusion surgeries. In an October 9, 2015 report, Dr. Cao reviewed findings of an October 5, 2015 cervical spine magnetic resonance imaging (MRI) scan which showed no significant interval change when compared to his prior MRI scan studies. She noted complaints of new onset of left face, neck, and left lower extremity paresthesias after appellant sustained mild trauma. With respect to appellant's post-concussion syndrome, which was minimally symptomatic, Dr. Cao reported that she expected these symptoms to resolve in the near future. On October 14, 2015 she reported that he could return to work with restrictions.

In a December 14, 2015 report, Dr. Cao noted appellant's complaints of occasional stuttering, left-sided face tingling, speech disturbance, and left facial paresthesias. Appellant was referred for a brain MRI scan study to rule out intracranial structural abnormalities. Dr. Cao reported that appellant's post-concussion syndrome had improved, and his cervical and lumbar spondylosis symptoms had also improved. In a January 13, 2016 treatment note, she reported that he presented for a follow-up of his December 22, 2015 MRI scan of the brain study. Dr. Cao reported that the study revealed normal brain findings. She reported that appellant continued to complain of intermittent paresthesias in the left jaw area, occasional right-sided periorbital headaches, and mild speech stuttering when tired. Dr. Cao diagnosed speech disturbance and left facial paresthesias. Given that appellant's MRI scan of the brain was unremarkable, she questioned if his speech disturbance was related to emotional stress and whether the left facial paresthesias was cervicogenic. Dr. Cao noted that his post-concussion syndrome and cervical and lumbar spondylosis had improved. She released appellant to regular-duty work and instructed him to follow-up on an as needed basis.

On April 11, 2019 appellant filed a notice of recurrence (Form CA-2a) for medical treatment only beginning January 30, 2019. He explained that he had work restrictions following the initial August 24, 2015 employment injury, but continued to experience neck pain, swelling, and numbness. When describing his alleged recurrence, appellant reported a cervical spine injury at C3-4 which was evidenced on an October 9, 2018 MRI scan. He noted that, following the

August 24, 2015 employment injury, he experienced a slipping incident in a parking lot with a near fall which resulted in a herniated lumbar disc and injury to his lower back.⁴

In support of his claim for a recurrence, appellant submitted various nursing notes, work restrictions, an August 19, 2016 brain MRI scan, August 19, 2016 and October 9, 2018 cervical spine MRI scans, and referral forms. He also resubmitted Dr. Cao's January 13, 2016 medical report.

An unsigned August 19, 2016 attending physician's report (Form CA-20) was provided which noted an August 25, 2015 date of injury when appellant was walking through a hatch and hit his head. The diagnosis was noted as multi-level degenerative changes most prominent at C3-4, moderate-to-severe right foraminal stenosis, C3-4 osteophyte mild narrowing of central canal, and moderate-to-severe facet joint effusion.

In a development letter dated April 26, 2019, OWCP notified appellant of the factual and medical deficiencies of his recurrence claim. It advised him of the type of evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

Appellant responded to OWCP's development letter in a statement signed on May 23, 2019. He reported that his recurrence occurred during his assignment in January 2018. Appellant described his employment duties which included crawling in tanks and spaces for assigned ship repairs. He asserted that he underwent an MRI scan which revealed damage at C2-3, C3-4, and C4-5 which was not present prior to his concussion. Appellant noted that he previously had fusion surgery at C5-7 in May 2004. He reported that he was not required to crawl in tanks and small spaces until he was released to full duty in 2016. Appellant reported that he not have continual neck pain until after he slipped on ice which placed stress on his neck and resulted in damage to his lower back at L1-L2, L2-L3, and L3-L4. He noted that on January 16, 2018 he was placed on limited duty as a result of the slipping incident due to his lower back disc injuries in conjunction with his neck injuries. Appellant reported that he sought treatment for his spinal injuries with Dr. Theresa Jackson, Board-certified in physical medicine and rehabilitation, who subsequently conducted an October 2018 MRI scan of his neck after he complained of pain and numbness.

Medical reports and diagnostic studies were submitted documenting treatment for appellant's lumbar condition from OWCP File No. xxxxxx946, including reports from Dr. Jackson.

In a January 16, 2018 medical report, Dr. Jackson reported that appellant experienced severe lower back pain after he was "playing in the snow." Appellant described what felt like a rubber band snapping which was followed by severe pain, causing him to drop to the ground. Dr. Jackson diagnosed acute midline low back pain with right-sided sciatica, lumbar herniated

⁴ On April 10, 2019 appellant filed a traumatic injury claim (Form CA-1) alleging that on January 6, 2018 he sustained a work-related lumbar injury when he slipped on ice and grabbed his vehicle, feeling a pop in his lower back. OWCP assigned OWCP File No. xxxxxx946. He asserted that the incident resulted in a right paracentral disc protrusion with an annular tear at L3-4 severely flattening thecal sac and a diffused disc bulge with a protrusion annular tear at L2-3. The claim has not been accepted by OWCP as work related. OWCP has not administratively combined his claim files.

nucleus pulposus, right leg weakness, gait abnormality, and post-laminectomy syndrome of the lumbar region. A January 16, 2018 work restriction note was provided.

In an October 9, 2018 medical report, Dr. Jackson reported that appellant was a long-standing patient. She noted that he had undergone multiple spine surgeries, including two cervical and two lumbar surgeries, of which two had been major fusion procedures. Dr. Jackson reported that appellant's spine conditions prevented him from performing full physical work resulting in permanent work restrictions which would require telework.

Appellant also provided an April 3, 2014 MRI scan study of the cervical spine which noted evidence of C5-7 anterior cervical fusion with vertebral plate and cortical screws.

By decision dated June 5, 2019, OWCP denied appellant's recurrence claim finding that the medical evidence of record was insufficient to establish that his need for additional medical treatment was due to a material change/worsening of his accepted work-related condition, without intervening cause.

On July 9, 2019 appellant requested reconsideration.

In support thereof, appellant resubmitted Dr. Cao's medical reports dated October 2, 2015 through January 13, 2016 documenting treatment for cervical and lumbar spondylosis and post-concussion syndrome.

Appellant subsequently submitted a January 22, 2015 x-ray of the cervical spine, which revealed status post anterior fusion from C5-7 with anterior plate and screw fixation. A January 22, 2015 x-ray of the lumbar spine, an April 11, 2015 MRI scan of the cervical spine, an April 30, 2015 computerized tomography scan of the cervical spine, an October 5, 2015 MRI scan of the cervical spine, a December 22, 2015 MRI scan of the brain, an August 19, 2016 MRI scan of the cervical spine, an October 9, 2018 MRI scan of the cervical spine, and a November 22, 2015 MRI scan study of the brain.

By decision dated July 30, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵

⁵ 20 C.F.R. § 10.606(b)(3); *see also* *H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).⁹

Appellant disagreed with the June 5, 2019 decision and filed a timely request for reconsideration on July 9, 2019. He did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁰

In support of his claim, appellant resubmitted a number of medical reports from Dr. Cao dated from October 2, 2015 through January 13, 2016. Evidence which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.¹¹ As such, the Board finds that these reports are insufficient to warrant a merit review.

Appellant also submitted numerous diagnostic reports pertaining to the head, cervical spine, and lumbar spine dated April 2, 2014 through October 9, 2018. These reports are also insufficient to warrant merit review as diagnostic studies, standing alone, lack probative value and are insufficient to establish the claim.¹² The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹³ As appellant failed to provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

⁶ 20 C.F.R. § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁷ *Id.* at § 10.608(a). *See also D.P.*, Docket No. 19-0001 (issued June 13, 2019); *M.S.*, 59 ECAB 231 (2007).

⁸ 20 C.F.R. § 10.608(b); *S.M.*, Docket No. 18-1158 (issued January 16, 2019); *J.F.*, Docket No. 17-1508 (issued March 28, 2018); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *L.S.*, Docket No. 16-0088 (issued June 10, 2016).

¹⁰ *N.C.*, Docket No. 19-1378 (issued February 13, 2020).

¹¹ *See L.B.*, Docket No. 17-1600 (issued March 9, 2018).

¹² *J.P.*, Docket No. 19-0216 (issued December 13, 2019); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

¹³ *G.Q.*, Docket No. 18-1697 (issued March 21, 2019); *Alan G. Williams*, 52 ECAB 180 (2000).

Accordingly, the Board finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁴

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2020
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ See *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).